

Vet.App. No. 15-4618

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**IN THE UNITED STATES COURT  
OF APPEALS FOR VETERANS CLAIMS**

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**OSCAR P. BATTLE,**  
Appellant,

**v.**

**ROBERT A. McDONALD,**  
Secretary of Veterans Affairs  
Appellee.

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ON APPEAL FROM THE BOARD OF VETERANS' APPEALS

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**BRIEF OF THE APPELLEE  
SECRETARY OF VETERANS AFFAIRS**

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LEIGH A. BRADLEY  
General Counsel

MARY ANN FLYNN  
Chief Counsel

SELKET N. COTTLE  
Deputy Chief Counsel

MARGARET E. SORRENTI  
Appellate Attorney  
Office of the General Counsel (0271)  
U.S. Department of Veterans Affairs  
810 Vermont Avenue, N.W.  
Washington, D.C. 20420  
(202) 632-6790

Attorneys for Appellee

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**ON APPEAL FROM THE  
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**BRIEF OF THE APPELLEE  
SECRETARY OF VETERANS AFFAIRS**

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**I. ISSUE PRESENTED**

Whether the Court should affirm the Board of Veterans' Appeals' (Board) October 30, 2015, decision that denied Appellant's claim of entitlement to service connection for a gastrointestinal (GI) disorder (claimed as a "stomach" condition), to include diverticulitis.

**II. STATEMENT OF THE CASE**

**A. Jurisdictional Statement**

This Court has jurisdiction under 38 U.S.C. § 7252(a) to consider the Board's decision.

## **B. Nature of the Case**

Appellant, Oscar P. Battle, appeals the Board's October 30, 2015, decision that denied Appellant's claim of entitlement to service connection for a GI disorder (claimed as a "stomach" condition), to include diverticulitis.

## **C. Statement of Relevant Facts**

Appellant served on active duty from July 1966 to July 1970. [Record (R.) at 167]. In May 1970, Appellant stated that he had frequent indigestion, associated with overeating. [R. at 184-85]. His May 1970 discharge examination reflects no abnormalities of the abdomen and viscera. [R. at 171-72]. In a June 1970 treatment record, Appellant complained of stomach pain only present after eating or drinking and that lasts two to three hours. [R. at 178]. The impression was of "functional bowel disease." *Id.* Another June 1970 record noted Appellant had chest and stomach pains and stated that Appellant had hiatal hernia symptoms and "pain after meals (heartburn)." [R. at 179].

In June 1997, Appellant began having bloody bowel movements. [R. at 371-72]. A colonoscopy at that time revealed extensive right-sided diverticular disease with possible blood and stool in one of the diverticula. *Id.* A February 2007 colonoscopy showed diffuse diverticulosis. [R. at 655-56]. In June 2007, Appellant was hospitalized for a lower GI bleed. [R. at 627]. Appellant was hospitalized again in September 2009 for bloody stools. [R. at 488-90]. An esophagogastroduodenoscopy demonstrated a duodenal ulcer and the physician found that the "most likely etiology of the patient's ulcer is recent [nonsteroidal

anti-inflammatory drug] use related to his sore throat." [R. at 489 (488-90)]. In April 2010, Appellant was again hospitalized for bloody stools. [R. at 466-68]. An esophagogastroduodenoscopy was unremarkable for stomach, duodenum and esophagus. [R. at 466 (466-68)]. In April 2011, Appellant had acute lower GI bleeding, presumed secondary to a diverticular bleed. [R. at 137-38].

In May 2011, Appellant filed a claim to reopen his previously denied claim of entitlement to service connection for a stomach condition. [R. at 363]. In a June 2011 VA examination, the examiner diagnosed Appellant with a history of diverticulosis. [R. at 342 (341-50)]. During the examination, Appellant reported that he had stomach problems in 1968 and "always have a little pain to the left side of my stom[a]ch." [R. at 343 (341-50)]. The examiner found that Appellant did not have any stomach issue or condition and that his "claimed stomach condition" was not caused by service. [R. at 348 (341-50)]. The examiner explained that Appellant's diagnosed condition, diverticulitis, was not mentioned in his service records and noted that his in-service complaints were related to indigestion. *Id.* The examiner also noted that there was no documentation of stomach or GI issues from 1970 to 1995 and that records since 1997 reflect that Appellant had diverticulitis. *Id.* A July 2011 treatment record noted that Appellant had recurrent GI bleeding, presumed diverticular, with mid-ascending colon diverticulum with adherent clot. [R. at 336 (335-37)]. His family medical history included that his mother had diverticulitis. *Id.* In a September 2011

Rating Decision, the Regional Office (RO) denied Appellant's claim of entitlement to service connection for a stomach condition. [R. at 313-18].

In October 2013, Appellant submitted a September 2013 statement from his private physician, Dr. James Partridge, that he "would not think there is any connection" between Appellant's diverticulosis and service. [R. at 232 (230-32)]. Dr. Partridge noted that Appellant's service treatment records "mention more about hiatal hernia, there is no testing that would suggest that diverticulosis was ever a diagnosis that was entertained, much less tested for. Even if [diverticulosis was tested for] there is no indication that any type of military service would cause diverticulosis[;] it is mainly related to constipation." *Id.*

The Board issued the decision on appeal in October 2015. [R. at 1-13].

### **III. SUMMARY OF THE ARGUMENT**

The Board provided adequate reasons or bases for its finding that Appellant's current GI disorders (diverticulosis and duodenal ulcer) are not related to service and Appellant fails to point to any evidence of such a nexus.

### **IV. ARGUMENT**

#### **A. Applicable Law**

Service connection may be granted for a disability resulting from personal injury suffered or disease contracted in the line of duty, or for the aggravation of a pre-existing injury or disease in the line of duty. 38 U.S.C. § 1110; 38 C.F.R. § 3.303(a). Establishing service connection generally requires competent medical, or in certain circumstances, lay evidence of a current disability, an in-



service incurrence or aggravation of an injury or disease, and a nexus between the claimed in-service injury or disease and the current disability. See *Hickson v. West*, 12 Vet.App. 247, 253 (1999). Service connection may be awarded on a secondary basis if a claimant suffers a disability that is “proximately due to or the result of a service-connected disease or injury.” 38 C.F.R. § 3.310(a). The Board's determination of service connection is a question of fact that the Court reviews under the clearly erroneous standard. See *Gilbert v. Derwinski*, 1 Vet.App. 49, 52-53 (1990) (finding of fact is not clearly erroneous if there is a plausible basis for it in the record).

Once the Secretary undertakes the effort to provide an examination, even if not statutorily obligated to do so, he must provide an adequate one. *Barr v. Nicholson*, 21 Vet.App. 303, 311 (2007). An adequate medical opinion must be based upon a consideration of the relevant evidence and must provide the Board with a foundation sufficient to evaluate the probative worth of that opinion. See *Ardison v. Brown*, 6 Vet.App. 405, 407 (1994) (adequate medical examination is one that is based on consideration of veteran's prior medical history and describes his or her condition with a level of detail sufficient to allow the Board to make a fully informed decision on the relevant medical question). This requires the examiner to not only render a clear conclusion on the relevant medical question but to support that conclusion “with an analysis that the Board can consider and weigh against contrary opinions.” *Steffl v. Nicholson*, 21 Vet.App. 120, 124 (2007) (holding that “a mere conclusion by a medical doctor is

insufficient to allow the Board to make an informed decision as to what weight to assign to the doctor's opinion"); see also *Nieves-Rodriguez v. Peake*, 22 Vet.App. 295, 301 (2008) (examiner must provide "not only clear conclusions with supporting data, but also a reasoned medical explanation connecting the two"). But this obligation is not insurmountable and an examination report need not "explicitly lay out the examiner's journey from facts to a conclusion." *Monzingo v. Shinseki*, 26 Vet.App. 97, 106 (2012). Whether a medical examination is adequate and the extent to which, if any, it is probative of the relevant medical questions, are factual determinations that may not be disturbed unless clearly erroneous. See *Nolen v. Gober*, 14 Vet.App. 183, 184 (2000).

The Board is required to provide a written statement of the reasons or bases for its findings and conclusions on all material issues of fact and law presented on the record; the statement must be adequate to enable a claimant to understand the precise basis for the Board's decision, as well as to facilitate review in this Court. 38 U.S.C. § 7104(d)(1); *Allday v. Brown*, 7 Vet.App. 517, 527 (1995); *Gilbert*, 1 Vet.App. at 57. To comply with this requirement, the Board must analyze the credibility and probative value of the evidence, account for the evidence that it finds to be persuasive or unpersuasive, and provide the reasons for its rejection of any material evidence favorable to the claimant. *Caluza v. Brown*, 7 Vet.App. 498, 506 (1995), *aff'd per curiam*, 78 F.3d 604 (Fed. Cir. 1996) (table); *Gabrielson v. Brown*, 7 Vet.App. 36, 39–40 (1994).

## **B. Analysis**

Here, the Board was not clearly erroneous in its finding that “[i]n combination, [the September 2013] private opinion and the [June 2011] VA examination opinion provided sufficient evidence for the adjudication of” Appellant’s claim. [R. at 4 (1-13)]; see *Nolen*, 14 Vet.App. at 184; see also *Monzingo*, 26 Vet.App. at 107 (holding that even if a medical opinion is inadequate to decide a claim, such opinion may nonetheless be entitled to probative weight). With regard to the June 2011 VA examination, Appellant argues that the examiner “limited his examination and did not adequately discuss whether [Appellant’s] current diagnosed disability was incurred in or the result of military service.” Appellant’s Brief (App. Br.) at 6. However, a review of the examination reflects that the examiner diagnosed Appellant with diverticulitis, [R. at 342 (341-50)], and explained that Appellant’s in-service complaints related to indigestion while his condition since 1997 has been characterized by GI bleeding related to diverticulitis, [R. at 348-49 (341-50)]. The examiner noted that Appellant had no diagnosed stomach condition in service, only indigestion, and that there was no documentation of any stomach or GI issues for 25 years between 1970 and 1995. [R. at 348 (341-50)]. Contrary to Appellant’s argument, App. Br. at 6, 9, the examiner provided a thorough review of Appellant’s complaints in service and since service and, as the Board noted, indicated that Appellant’s claimed “stomach disorder” was not due to service because his current diagnosis was of diverticulosis and his in-service complaints were related

to indigestion. [R. at 342-45, 348-49 (341-50)]; [R. at 8 (1-14)]; see *Ardison*, 6 Vet.App. at 407.

The Board also relied on the September 2013 private opinion of Dr. Partridge that Appellant submitted along with his October 2013 appeal to the Board. [R. at 8-9]; see [R. at 230-32]. As Dr. Partridge stated, diverticulitis is mainly related to constipation while Appellant's service records mention hiatal hernia and there was "no testing that would suggest that diverticulosis was ever a diagnosis that was entertained, much less tested for." [R. at 232]. While Appellant appears to take issue with Dr. Partridge not indicating that he reviewed the claims file, Appellant fails to point to any evidence that Dr. Partridge did not consider. See *Snuffer v. Gober*, 10 Vet.App. 400, 403-04 (1997) (review of claims file not required where it would not change the objective and dispositive findings made during a medical examination); see also *Monzingo*, 26 Vet.App. at 105 ("To the extent that Mr. Monzingo argues that the examiner did not provide a detailed review of the medical history or the severity of his current hearing loss, he confuses the duties of a medical examiner with those of a VA adjudicator." (emphasis omitted)); cf. *Nieves Rodriguez*, 22 Vet.App. at 303 (Board may not favor a VA opinion over another solely because the VA opinion reviewed the claims file). Appellant also argues that Dr. Partridge's opinion lacked adequate rationale. App. Br. at 6-7. However, the examiner provided an adequate rationale for his opinion and explained that Appellant's service records do not note any indication of diverticulosis and, "[e]ven if there was such a notation,

there is no indication that any military service would cause diverticulosis [as] it is mainly related to constipation.” [R. at 232]; *Ardison*, 6 Vet.App. at 407. The Secretary also notes that, as discussed, the Board relied on the September 2013 private opinion “in combination with” the June 2011 VA examination to find that Appellant was not entitled to service connection for a GI disorder. [R. at 4 (1-14)]; *Monzingo*, 26 Vet.App. at 107. The Board was not clearly erroneous in its reliance on these opinions to find that the record failed to reflect any indication of a currently diagnosed condition related to Appellant’s service, to include his in-service indigestion/heartburn. [R. at 10 (1-14)]; see *Nolen*, 14 Vet.App. at 184.

The Board also provided adequate reasons or bases for its decision. *Allday*, 7 Vet.App. at 527; *Gilbert*, 1 Vet.App. at 57. The Board provided a thorough review of Appellant’s claims file and all material evidence of record. [R. at 5-9 (1-14)]; *Caluza*, 7 Vet.App. at 506. Contrary to Appellant’s argument that the Board “failed to determine that [Appellant’s] claim for a stomach condition was actually a claim for diverticulitis,” App. Br. at 7, the Board specifically characterized Appellant’s claim as one for a GI disorder, “to include diverticulitis.” [R. at 2 (1-14)]. Throughout its decision, the Board refers to Appellant’s claim as that of entitlement to service connection for diverticulitis. [R. at 2, 3, 5, 8, 9 (1-14)]. Appellant’s claim was not “denied based on his mistaken belief that diverticulitis is a stomach condition” as Appellant claims. App. Br. at 8; see [R. at 5-10 (1-14)]. The Board denied Appellant’s claim because “the competent medical evidence of record is against a finding that [Appellant] has a [GI]

disorder, to include diverticulosis, related to his military service.” [R. at 9 (1-14)]. Appellant fails to point to any evidence of such a nexus. See *Hilkert v. West*, 12 Vet.App. 145, 151 (1999) (en banc) (appellant bears the burden of demonstrating error), *aff’d* 232 F.3d 908 (Fed. Cir. 2000); *Berger v. Brown*, 10 Vet.App. 166, 169 (1997) (“[T]he appellant . . . always bears the burden of persuasion on appeals to this Court.”); see also *Jones v. Shinseki*, 23 Vet.App. 382, 391 (2010) (“Notwithstanding the duty to assist, it remains the claimant’s responsibility to submit evidence to support his claim.”). Along with the September 2013 private opinion and the June 2011 VA examination, the Board noted the 27 years between service and Appellant’s development of bleeding that was found to be related to his diverticulosis and to an ulcer. [R. at 9 (1-14)]; see [R. at 371-72 (June 1997 medical record reflecting first notation of bloody stools and diagnosis of diverticular disease)]; [R. at 489 (488-90) (“most likely etiology of the patient’s ulcer is recent [nonsteroidal anti-inflammatory drug] use related to his sore throat”)]; see *Maxson v. Gober*, 230 F.3d 1330 (Fed. Cir. 2000) (a prolonged and unaccounted for period of time without medical complaint can be taken into consideration by the Board as evidence of whether an injury or disease was incurred in service). As the Board correctly found that the record failed to show that Appellant’s diverticulosis was related to service, and as Appellant fails to point to any material evidence that the Board did not consider, the Secretary requests that the Court conclude that the Board’s finding was not clearly erroneous. *Gilbert*, 1 Vet.App. at 52-53.

The Secretary has limited his response to only those arguments raised by Appellant in his opening brief, and, as such, urges this Court to find that Appellant has abandoned all other arguments. See *Pieczenik v. Dyax Corp.*, 265 F.3d 1329, 1332-33 (Fed. Cir. 2001); *Norvell v. Peake*, 22 Vet.App. 194, 201 (2008); *Woehlaert v. Nicholson*, 21 Vet.App. 456, 463 (2007) (“This Court has consistently held that it will not address issues or arguments that counsel for the appellant fails to adequately develop in his or her opening brief.”). The Secretary, however, does not concede any material issue that the Court may deem Appellant adequately raised and properly preserved, but which the Secretary did not address, and requests the opportunity to address the same if the Court deems it necessary.

## **V. CONCLUSION**

For the foregoing reasons, the Secretary respectfully asserts that the Court should affirm that part of the Board’s October 30, 2015, decision that denied Appellant’s claim of entitlement to service connection for a GI disorder (claimed as a “stomach” condition), to include diverticulitis.

Respectfully submitted,

**LEIGH BRADLEY**  
General Counsel

**MARY ANN FLYNN**  
Chief Counsel

/s/ Selket N. Cottle  
**SELKET N. COTTLE**  
Deputy Chief Counsel

/s/ Margaret E. Sorrenti

**MARGARET E. SORRENTI**

Appellate Attorney

Office of the General Counsel (0271)

U.S. Department of Veterans Affairs

810 Vermont Avenue, N.W.

Washington, D.C. 20420

(202) 632-6790

Attorneys for Appellee

Secretary of Veterans Affairs